PETITION FOR A WRIT OF CERTIORARI

FILED
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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1955

No. 820

LILLIAN V. ROBINSON, as Administratrix of the goods, chattels and credits of FRANK WALLIS ROBINSON, deceased,

Petitioner,

against

NORTHEASTERN STEAMSHIP CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Lillian V. Robinson, as Administratrix of the goods, chattels and credits of Frank Wallis Robinson, deceased, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in the above entitled action, rendered on January 5, 1956.

Official Report of the Court Below

The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 228 F.2d 679.

Jurisdiction

The opinion of the court below was filed and judgment thereon entered in the office of the Clerk of the Court on January 5, 1956.

Jurisdiction to review this decision is predicated upon the provisions of Title 28 U. S. C. § 1254(1).[1]

Question Presented

What are the obligations, if any, of a shipowner to a seaman for the seaman's safe return to his ship, moored in a foreign port, when the seaman, through illness or drunkenness, is incapable of returning to the vessel in safety without assistance, it being common knowledge that a seaman always helps a fellow seaman, who is sick or drunk, return to his ship? Is such help in the interest of the shipowner and the furtherance of his business or is such help a purely voluntary act, unrelated to the shipowner's business so as to obviate any legal responsibility of respondeat superior, for the consequences of injury negligently caused during the course of such assistance?

It would appear that the intent of Congress in enacting the Jones Act [2] was to indemnify seamen for the consequences of negligence by a fellow-seaman, not only on the vessel itself but in bringing seamen, particularly disabled seamen, back to the vessel.

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[1] Title 28 U. S. C. § 1254(1).

§ 1254. Court of Appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *.

[2] Jones Act, 46 U. S. C. § 688.

Statutes and Regulations Involved

The Jones Act, 46 U. S. C. Section 688.[3]

Statement of Facts

The facts stated herein are within the record of the United States District Court, Southern District of New York, and all references to pages are from said District Court record.

Facts of the case were stipulated to by counsel for the respective parties in a pretrial order, dated March 19, 1953 (R. 344-347).

(a) That the decedent was employed as an a. b. aboard the S. S. NORTH BEACON.

(b) That the decedent's base wages as an a. b. on the S. S. NORTH BEACON were $226.01 per month.

(c) That the decedent died and his body was found inside the "customs compound" near certain railroad tracks at a distance of about 1,044 feet from the gangway of the vessel, the S. S. NORTH BEACON and about 326 feet from the rear gate that the decedent had entered.

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[3] § 688. RECOVERY FOR INJURY TO OR DEATH OF SEAMAN.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(d) That the decedent left the vessel on shore leave at approximately 7:30 o'clock in the morning [4] and remained ashore until the time of his death.

(e) That the train involved in the plaintiff's death was not owned, operated or controlled by the defendant.

(f) That the defendant left him surviving his widow Lillian V. Robinson who is the Administratrix and plaintiff herein, whose age was 42 years at the time of decedent's death, also three children, namely, a daughter Nordelle, who was 12 years old at the time of her father's death, also a son Charles Henry, whose age was five years and another daughter named Ann Margaret, whose age was six years.

(g) That the decedent and the plaintiff herein, namely Lillian V. Robinson were married on the 12th day of April, 1936.

Additional facts were testified to:

The captain of the vessel failed to post warning signs not to use the rear gate, nor did he forbid the crew from using it (R. 109).

Testimony was that the rear gate of the compound (enclosed by a wire fence (R. 91, 92)) was for the use of railway trains only. The main gate was for pedestrians and automobiles (R. 130, 131, 181). Pedestrians used the rear gate (R. 131). The said rear gate had less light than the main gate (R. 77); a pedestrian had to cross the railroad tracks if entering the rear gate, but did not if using the main gate (R. 109), which was clear of cargo (R. 86, 87).

July 20, was the national independence day of Colombia; generally celebrated by private and public dances and a great deal of drinking (R. 52, 159, 160).

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[4] Agreed to by counsel that decedent left vessel after 4:30 p. m. and not 7:30 a. m. as stated in the pretrial order (R. 9).

The vessel was in port, the crew on day duty, from 8:00 a. m. to 5:00 p. m. (R. 59, 60, 61).

Woods, a fellow able-bodied seaman of the deceased, and his watch partner (R. 54, 58-59), was directed to the decedent "around midnight" (R. 66) in the "red light" section of Buenaventura, Colombia, where there were taverns and bars (R. 65, 66).

Robinson was sitting on the ground outside of a building (R. 68, 69).

Woods had been walking on his return to the vessel, within walking distance (R. 66, 68), but when coming upon Robinson, stopped a cab to continue back to the ship with Robinson (R. 69).

Woods knew the condition of the compound (R. 63, 78).

Woods knew that there were railroad tracks in the dock compound area by the rear gate (R. 78).

It would appear that Woods, the fellow seaman, in the same department (R. 54) and on the same day work hours as the deceased (R. 58, 59), would have the same knowledge of the condition of the area.

Woods took the cab to the rear gate (R. 76, 77), and permitted Robinson to leave alone (R. 71), while Woods was escorted to the vessel by the customs guard and the cab driver (R. 71, 72).

Woods' testimony was that upon reaching the compound, he found that deceased was missing, that he did not look for him (R. 77). Woods returned to the vessel through the compound area with the taxi driver and the gate guard (R. 77) leaving the deceased to his own incapacities.

Landron, a fellow seaman, had seen Robinson at 9:00 p. m. or 10:00 p. m. in the "Aurora" bar with two natives, drinking, and joined Robinson in a couple of drinks (R. 81, 82).

Andrews, Chief Engineer, was with Robinson about 10 or 10:30 p. m. in a bar (R. 93) and the decedent was very

drunk (R. 94, 98). His speech was thick, he could hardly talk, he was "wild in the face" (R. 96, 98), his eyes red (R. 96) and he smelled of drink (R. 97).

Andrews saw Robinson dead at 3:30 a. m.

The body was in pieces, strewn along the railroad track (R. 50).

The action was tried before the Honorable John W. Clancy and a jury on March 30, and 31, 1954. At the close of plaintiff's case, upon motion by defendant, the complaint and action was dismissed.

Said motion to dismiss was grounded upon an assertion of contributory negligence and assumption of risk of the deceased and that Woods (decedent's fellow-seaman) did not assume the responsibility for decedent's safety.

On appeal, the Court of Appeals in affirming the dismissal, found that Woods might have been found negligent in performing his duties but that liability to the shipowner was negated by the absence of authority or request to act upon the custom of the trade (the basis of Woods' action).

Basis of Jurisdiction of the United States District Court for the Southern District of New York

The jurisdiction of the United States District Court for the Southern District of New York was invoked upon the provisions of the Jones Act, 46 U. S. C. § 688.

Reasons Relied on for the Allowance of the Writ

By arbitrarily refusing to recognize and accept a custom of the trade, developed for the protection of seamen and for the benefit of shipowners generally, the shipowner in this matter has destroyed the effect of said custom and negated its own liability resulting from the negligence of

its employee. The Supreme Court of the United States should review the question of whether a shipowner has the power to obviate its liability arising under specific statutory law, which would serve to emasculate the effects of Congressional legislation and tend to destroy the customs of the trade controlling the affairs of industry and trade throughout the United States.

POINT I

The liability of an employer-shipowner is imputed for the negligence of an employee fellow-seaman and cannot be negated by a refusal by the shipowner to authorize and request a custom, developed for the benefit of both seamen and shipowners and acted upon by the employee.

The court below found that Woods, the fellow-employee of the deceased could have been found negligent for his actions in causing the death of Robinson.

The sole reason for the dismissal by the District Court, and affirmance by the Court below was the refusal of said courts to consider the negligent act of an employee-fellow-seaman to be the imputed act of the shipowner, within a custom of the trade developed for the benefit of both seamen and shipowners, in the course of his employment.

The court below held that the mere absence of authorization and request to act upon a custom of the trade by the employer negated its liability, which would otherwise arise under the provisions of the Jones Act, *supra.*

It would appear that such contention by the court below was erroneous insofar as it would tend to aid in the destruction of any custom of the trade, the foundation of most business practice, and approved practice in every industry throughout the nation, by the simple expedient of an employer disclaiming knowledge or recognition thereof.

In *Gulf Refining Co.* v. *Universal Ins. Co.*, 32 F.2d 555 (2nd Circ.), an action involving cargo loss by reason of fire, the court below found that custom, once established, bound the parties irrespective of any assent or failure to assent. The Court, citing and quoting Williston on Contracts § 649 with approval, stated:

> "* * * custom derives its efficacy from its adoption into the law, and when once established is binding, irrespective of any manifestation of assent by parties concerned * * * Custom * * * may be of importance in any department of the law" (p. 557).

In *Silverstein* v. *Michau*, 221 F. 55 (2nd Circ.), the court below found that there was a presumption of knowledge of a general custom existing in a particular trade.

The Court, holding that knowledge of such custom was immaterial and further, that the existence of such custom was a question of fact for the jury, declared:

> "The evidence of custom was not contradicted by the defendants and the fact that they did not know of its existence is not material. Where a general custom exists in a particular trade, it is presumed that all those engaged in that trade are familiar with its existence and requirements and make their agreements in the light of such custom" (p. 56).

In *O'Neill* v. *Gray*, 30 F.2d 776 (2nd Circ.), the court below found that conflicting evidence of the existence of a custom was a question of fact for the jury.

In *McClellan* v. *Pennsylvania R. Co.*, 62 F.2d 61 (2nd Circ.), a suit under the Federal Employers' Liability Act, 45 U. S. C. § 1 *et seq.*, the court below stated that the existence of a custom of the trade was a question of fact for consideration by the jury.

See also: *Electrical Research Products, Inc.* v. *Gross*, 120 F.2d 301.

It would appear that, the knowledge of the shipowner being immaterial, such knowledge being presumed and the question of existence of said custom a question of fact to be determined by a jury, that the dismissal of this action by the District Court and its affirmance by the Court of Appeals was erroneous in taking from the jury a question which, if found in favor of plaintiff, would have given rise to liability to the defendant shipowner herein.

CONCLUSION

For the reasons set forth above, we respectfully submit that this Court should issue its writ of certiorari to the United States Court of Appeals for the Second Circuit in this cause.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

HARVEY GOLDSTEIN,
On the Petition.

Appendix A

(Opinion of United States Court of Appeals, For the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 16—October Term, 1955.

(Argued December 5, 1955 Decided January 5, 1956.)

Docket No. 23502

LILLIAN V. ROBINSON, as Administratrix of the goods, chattels and credits of FRANK WALLIS ROBINSON, deceased,
Plaintiff-Appellant,

v.

NORTHEASTERN STEAMSHIP CORPORATION,
Defendant-Appellee.

Before:

SWAN, FRANK and LUMBARD,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Clancy, *Judge.*

Action under the Jones Act by the administratrix of a seaman who was killed, while on shore leave, by a locomotive not owned, operated or controlled by the defendant. At the close of the plaintiff's case, the court granted a motion to dismiss the complaint. The plaintiff has appealed from the judgment of dismissal. Affirmed.

JACOB RASSNER, *Attorney for appellant;* HARVEY GOLDSTEIN, of Counsel.

Appendix A

KIRLIN, CAMPBELL & KEATING, *Attorneys for appellee;* WALTER X. CONNOR and MATTHEW L. DANAHAR, of Counsel.

SWAN, *Circuit Judge*:

This is an action under the Jones Act, 46 U. S. C. A. § 688, tried before Judge Clancy and a jury, wherein the complaint was dismissed at the close of the plaintiff's case for failure to prove a cause of action. The plaintiff's decedent, Frank W. Robinson, was an able bodied seaman employed by defendant as a member of the crew of its steamship, which lay at a dock in the port of Buenaventura, Colombia, South America, on the date of Robinson's death. While returning to the vessel from shore leave on the night of July 19, 1949, he was run over by a locomotive within the Customs Compound adjacent to the dock. Neither the locomotive nor the Customs Compound was owned, operated or controlled by the shipowner.

Upon the trial two theories of negligence were asserted: (1) Failure of the master of the vessel to warn the decedent of the danger of using the Customs Compound as a means of egress from and access to the vessel; and (2) failure of Woods, a fellow seaman, to perform his voluntarily assumed duty of escorting Robinson back to the vessel when Robinson was so intoxicated as to be unable to take care of himself within the dangerous area of the Compound.

The first theory of negligence has been expressly abandoned in the appellant's reply brief.[1] The alleged negli-

[1] At page 5 appears the statement: "Appellant does not rely upon the negligence of the master in failing to inform deceased of the dangerous condition of the dock compound." In the absence of such concession we should have held that under the circumstances disclosed by the evidence Judge Clancy's ruling was correct. See *Farrell* v. *United States*, 2 Cir. 167 F. 2d 781, affirmed 336 U. S. 511; *Wheeler* v. *West India S. S. Co.*, 2 Cir. 205 F. 2d 354, affirming 103 F. Supp. 631.

gence of Woods is now relied upon as requiring submission to the jury of disputed questions of fact. The appellant argues that Robinson was too drunk to take care of himself, that Woods voluntarily assumed the duty of escorting him back to the ship and performed this duty negligently in allowing Robinson to wander unattended into the Compound in his drunken condition, and that Woods' negligence is imputable to the defendant since Robinson's safe return would have been advantageous to the shipowner.

There was evidence from which the jury could have found that Robinson was intoxicated at about 10:30 P. M. and could reasonably have inferred that he was still intoxicated when Woods invited him to ride back to the Compound in a taxicab at about 2 A. M., despite Woods' testimony that Robinson did not then appear to be intoxicated. When they reached the rear gate of the Compound, Woods found that he had no money and while he was talking with the taxi driver and the customs guard to persuade them to accompany him to the ship in order to get the fare, Robinson got out of the cab and disappeared. Woods did not again see him. His body was found about 3 A. M. within the Compound, where he had been run over by a locomotive.

One who volunteers to assist another owes to such person the legal duty to use reasonable care in rendering the assistance he has undertaken to give. For example, if A invites B to ride in A's automobile, no one can doubt that A owes B the duty to drive with care.[2] It may be assumed *arguendo* that if the jury found Robinson was drunk, they could also have found that Woods was negligent toward him in allowing him to wander into the Compound unattended.[3] But such findings would not be enough to

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[2] Restatement, Torts § 323.

[3] Restatement, Torts § 324.

impose liability on the shipowner. To render the shipowner liable for Woods' conduct, he must be found to have violated a legal duty owed to the defendant. The appellant takes the position that a seaman who volunteers to assist a drunken shipmate on land assumes a duty of careful performance not only to him but also to the shipowner, since the latter will also be benefited by the safe return of the drunken employee. No authority has been cited for so extreme a contention. The case upon which the appellant relies, *Buckeye Steamship Co.* v. *McDonough*, 6 Cir., 200 F.2d 558, cert. denied 345 U. S. 926, is readily distinguishable. There the shipowner was held liable for the death of a drunken seaman who was drowned, when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him to the vessel. In that case in assisting his shipmate the negligent sailor was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was considered as acting within the scope of his employment.[4] In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by

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[4] This clearly appears in the opinion of the District Court, *McDonough* v. *Buckeye Steamship Co.*, 103 F. Supp. 473 at 475:

> "It is clear, from the testimony of Thomas Olson, the third mate of the Andrew Upson, that defendant's employees were authorized to assume control of seamen who were too intoxicated to be allowed on the dock alone. Olson related that the customary and established practice—at the various Great Lakes docks—was for the dock guard to detain these men and either turn them over to a sober shipmate if one appeared or else call the ship. The officer in charge of the ship then would personally go ashore or would send someone else to assist the seaman. This procedure was known to defendant and was the accepted and recognized practice invariably followed."

the defendant. Without such authorization Woods was not acting within the scope of his employment, and his negligence, if any, in performing his voluntary undertaking could not be imputed to the defendant even if successful performance would further the interests of the shipowner. See *In re Southern Pac. Co.*, 30 F.2d 723, 724 (S. D. N. Y., aff'd, 2 Cir., 30 F.2d 725; *The Edel*, 300 F. 731, 732 (S. D. N. Y.). Accordingly no cause of action was proved and the case was properly taken from the jury.

Judgment affirmed.

Appendix B

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of January one thousand nine hundred and fifty-six.

Present:

HON. THOMAS W. SWAN,
HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD,
Circuit Judges.

—o—

LILLIAN V. ROBINSON, as Administratrix, etc.,
Plaintiff-Appellant,

v.

NORTHEASTERN STEAMSHIP CORP. and ano.,
Defendants-Appellees.

—o—

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs taxed in favor of the appellees.

/s/ A. DANIEL FUSARO,
Clerk.

No. 820

FILED
MAY 3 1956
HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1955.

LILLIAN V. ROBINSON, as Administratrix of the goods, chattels and credits of FRANK WALLIS ROBINSON, deceased,

Petitioner,

against

NORTHEASTERN STEAMSHIP CORPORATION,

Respondent.

THE BRIEF OF RESPONDENT, NORTHEASTERN STEAMSHIP CORPORATION, IN OPPOSITION TO PETITION OF LILLIAN V. ROBINSON, AS ADMINISTRATRIX, FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1955.

LILLIAN V. ROBINSON, as Administratrix of the goods, chattels and credits of FRANK WALLIS ROBINSON, deceased,

Petitioner,

against

NORTHEASTERN STEAMSHIP CORPORATION,

Respondent.

THE BRIEF OF RESPONDENT, NORTHEASTERN STEAMSHIP CORPORATION, IN OPPOSITION TO PETITION OF LILLIAN V. ROBINSON, AS ADMINISTRATRIX, FOR WRIT OF CERTIORARI.

STATEMENT.

Petitioner's suit for damages for alleged wrongful death was dismissed on the trial because of the complete absence of any evidence of negligence on the part of the respondent. There was no opinion in the district court. The Court of Appeals for the Second Circuit affirmed with an opinion which is reported at 228 F. 2d 679.

Petitioner's decedent was a seaman who was killed by a locomotive while ashore for pleasure about 3 o'clock in the morning of July 20, 1949. Respondent was a shipowner and decedent's employer but did not own, operate or control either the train or the area where the death occurred.

The statement in the petition (p. 6) that the dismissal by the trial judge (John W. Clancy, C. J.) was on the "assertion of contributory negligence and assumption of

risk" is completely false. The petition takes so many other liberties with the facts that it cannot be regarded as a reliable guide by this court in ascertaining the proceedings below.

The entire petition is based on an alleged custom which is wholly fictitious. It was neither pleaded nor proved. The basis of the alleged custom is the unproven fact that seamen not only commonly help one another when drunk but they have a duty to their employer to do so. Petitioner argues here, that where there is a failure to successfully assist, the shipowner is to be cast in damages. As the Court of Appeals said in its opinion "No authority has been cited for so extreme a contention". 228 F. 2d 679, 681.

In connection with this non-existent custom, petitioner now maintains that her decedent was drunk at the time of his death although the proof which was offered on the trial was to the contrary. Petitioner's witness Woods was one of the last persons to see decedent alive. Woods was with him but minutes before his death and had been riding with him in a taxicab for some 10 or 15 minutes. Woods testified "I can tell whether the man [decedent] was intoxicated or not, because he did not show anything like that. • • •" 76.

Thus, before one considers the alleged custom, it must be well understood that in the case at bar, the decedent when he was last seen alive was not intoxicated nor helpless as suggested in the petition.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 USC Section 1254 (1). However, the petition fails to specify any important reasons for granting a writ here nor does it indicate that there exists any of the grounds

for granting a writ as set forth in Rule 19 of the Revised Rules of this court.

Question Presented

Is a shipowner liable for the negligent acts of its seaman employee, who, while ashore for his own pleasure voluntarily undertakes to escort an intoxicated fellow crew member, also ashore for his own pleasure, back to their ship?

In order to reach this question it is necessary to assume facts not proven on the trial. They are (1) that decedent was drunk and helpless; (2) that a shipmate undertook to care for him; (3) that the shipmate had a duty to his employer to do so, and (4) that the shipmate negligently failed to perform this duty.

Counter Statement of Facts

The SS. *North Beacon,* the vessel on which decedent was employed as an able bodied seaman arrived in the port of Buenaventura, Colombia, South America, at approximately 9:00 a. m. on July 18, 1949 (6).* Sea watches were broken and the seamen were free to go ashore after 5 p. m. (Plaintiff's Exhibit "12") (59, 61, 65). It is not known whether decedent went ashore on the day of arrival but he did go ashore the following day shortly after 4:30 p. m., for his own pleasure (9, item 3(d) Pre-trial Order dated 3/19/53). Early the next morning he was killed by a locomotive which was not owned, operated or controlled by the defendant (Item 3(c) (e) Pre-trial Order, dated 3/19/53).

The decedent's body was found in the Customs Compound, a large area enclosed by a fence about 1,044 feet from where the vessel was docked (Item 3 (c) Pre-trial Order

* References are to the stenographer's minutes.

dated 3/19/53, 91, 92). It was entered by means of several gates (130).

The decedent went ashore at about 4:30 p. m. on July 19. He was seen by Landron, a fellow crew member, about 9:00 p. m. or 10:00 p. m. in a bar called the "Aurora" located in the "La Pilota," a "red light" district (80, 81). At that time, according to Landron, although the decedent had had a couple of drinks, he was sober or as Landron expressed it "normal" (82).

Thereafter, sometime between 2:00 a. m., and 2:30 a. m., Woods, another crew member, who was also in the "La Pilota," hailed a taxicab to return to the vessel. His attention was drawn to decedent and decedent accepted Woods' invitation to join him in the cab (68, 69, 71, Plaintiff's Exhibit 13). They were driven to the rear gate of the Customs Compound, where a customs guard stopped the cab outside of the gate (71). At this point, Woods got out of one side of the cab and the decedent got out of the other side and walked away (Plaintiff's Exhibit 13). He was never again seen alive.

Woods talked to the driver a few minutes in an effort to induce him to come to the vessel where Woods could obtain money with which to pay the fare (Plaintiff's Exhibit 13). The cab driver finally agreed and he and Woods accompanied by a customs officer entered the Compound through the rear gate, and proceeded to the vessel (77), where Woods paid the driver (Plaintiff's Exhibit 13). Woods went to bed (72) and knew nothing about the decedent's death until about 7:00 a. m., when he was informed by the Master (Plaintiff's Exhibit 13).

Argument

Petitioner's theory in the trial court was contradictory. On the one hand, she alleged that decedent was sober and

on the other hand said that he was so intoxicated that he was unable to care for himself. In the Court of Appeals, petitioner abandoned the first claim, 228 F. 2d 679, 680, and expressly relied on the case of *McDonough* v. *Buckeye S. S. Co.*, 103 F. Supp. 473; affirmed 200 F. 2d 558 (6 Cir.) Cert. den. 345 U. S. 926.

However, as pointed out by the Court of Appeals in the case at bar, the plaintiff never proved the essential elements which were decisive of the *McDonough* case, viz.: that by custom it was well understood in the Great Lakes area that it was part of the duty of crew members who observed shipmates ashore in a condition unable to care for themselves to undertake to deliver the disabled seaman safely on board the vessel. Not only was there no proof of such custom in the case at bar, but there was no proof that the master of the S. S. *North Beacon* had authorized or instructed the members of the crew of the vessel to care for shipmates found ashore unable to care for themselves. Moreover, there was no evidence that on any prior occasion any crew member of this vessel or of any other vessel had ever undertaken to assist an intoxicated or disabled fellow crew member back to his ship.

Lacking such proof there is no justification for petitioner asserting as she has done in her brief under the heading "Reasons Relied on for the Allowance of the Writ" that the respondent arbitrarily refused to recognize and accept a custom of the trade developed for the protection of seamen for the benefit of shipowners generally. Absent such proof, the statement by petitioner under the same heading that the shipowner "had destroyed the effect of said custom and negated its own liability" is senseless or is intended to mislead this Court.

There is no need for this court to "review the question of whether a shipowner has the power to obviate its lia-

bility" arising under the Jones Act as requested by the petitioner, because respondent does not claim any such power nor has it attempted to exercise such power. There is nothing in the proceedings below to even suggest that the respondent has done what is proposed by this question.

Petitioner under Point I of her brief states that the sole reason for the dismissal of the action by the district court and the affirmance by the Court of Appeals was that both of these courts refused to impute the negligent acts of Woods to the respondent, "within a custom of the trade developed for the benefit of both seamen and shipowners, * * *". Here again petitioner refers to a "custom of the trade", when in fact there was no evidence of such custom. The courts below concluded that Woods was not within the scope of his employment because he had not been requested or authorized to rescue disabled crewmates and because there was no proof that it was the custom for seamen to do so. Assuming that Woods was negligent, his negligence cannot be imputed to respondent "even if successful performance would further the interests" of respondent. See *In Re Southern Pac. Co.*, 30 F. 2d 723, 724 (S. D. N. Y.) aff'd 2 Cir., 30 F. 2d 725; *The Edel*, 300 F. 731, 732; (S. D. N. Y); *Brailas* v. *Shephard S. S. Co.*, 152 F. 2d 849, 850 (2 Cir.), Cert. den. 327 U. S. 807.

Despite the fact that petitioner below relied entirely upon the *McDonough* case she has studiously avoided making any reference to it in her petition. The reason for this omission is obvious. That case holds, as pointed out by the Court of Appeals in the case at bar, that before a shipowner can be held liable for the negligent acts of a crew member ashore acting in the capacity of a "good samaritan" there must be proof that the shipowner either requested or authorized the services performed by the crew member or there must be proof that there was a custom in the trade,

in the area in which the shipowner operated, for crew members to assume this role. There was no such proof here as noted in the opinion. Petitioner clearly recognizes this lack of proof because no reference to such proof is mentioned in the petition.

Even though there was not an iota of proof as to this custom, petitioner condemns respondent and the lower courts for refusing "to recognize and accept" such custom and destroying "the effect of said custom". Custom is a question of fact and like all other fact questions must be proved by evidence. Surely petitioner is aware of the necessity of such proof because she cites in her brief the case of *McClellan* v. *Pennsylvania R. Co.*, 62 F. 2d 61 (2 Cir.) in which the Court of Appeals very clearly indicated this requirement. It said at page 63:

> "Whenever there is substantial evidence of the existence of such a custom, the question of fact is for the jury and this applies to a railroad yard. Director General of Railroads *v.* Templin (C. C. A.), 268 F. 483; Lehigh Valley R. R. Co. *v.* Doktor, *supra.*
>
> "Like all other questions of fact, a custom must be proved by evidence which if believed is enough to put it beyond mere conjecture and into the realm of reality. • • •
>
> "Proof of a custom cannot be said to be enough to submit that issue to the jury unless there is substantial evidence to show that what is called custom amounts to a definite, uniform and known practice under certain, definite, and uniform circumstances. Chicago, M. & St. P. Ry. Co. *v.* Lindeman (C. C. A.), 143 F. 946; Wabash R.R. Co. *v.* Kithcart (C. C. A.), 149 F. 108, 9 Ann. Cas. 497. Though it was for the jury alone to decide the fact as to the existence of a custom as one of the things to be considered in deciding whether or not the defendant was negligent, nevertheless as a special rule of conduct by which

> the defendant was to be judged it had to be proved as a definite, uniform practice before it could be accepted to alter the standard of care the law would otherwise fix." • • •

In none of the cases cited on page 8 or 9 of petitioner's brief did the court suggest that custom could be considered without proof thereof.

CONCLUSION.

The petition fails to present any important reason for granting a writ. No substantial question is raised. Moreover, the record below is barren of evidence tending to support the question attempted to be raised by the petition.

The petitioner's complaint was properly dismissed and it is respectfully submitted that this Court should deny the petition.

Respectfully submitted,

WALTER X. CONNOR,
Attorney for Respondent,
Northeastern Steamship Company.

MATTHEW L. DANAHAR,
Counsel.

APPENDIX

PLAINTIFF'S EXHIBIT 13

NORTHEASTERN STEAMSHIP CORPORATION
Eighty Broad Street
Room 1400
New York 4, N. Y.

SS. *North Beacon*
Buenaventura Colombia.
July 20, 1949

STATEMENT BY SAMUEL WOODS*—A. B. SS. *North Beacon.*
Regarding death of Frank Robinson.
Ex. A. B. SS. *North Beacon.*

Morning of July 20, 1949 about 2.00 to 2.30 A. M. I was ashore up on what they call pilot street here and had been there most of the night and when I was about to go back I got a taxi, as I was to leave in the taxi someone called my attention to a member of our crew sitting down outside a house there, after I saw him and saw it was Robinson A. B. on the SS. *North Beacon* I called him and he come in the taxi with me, the taxi driver then took us down to the gate and as/ I got/ out Robinson also got out on the other side and kept going.

I had to talk to the driver and asked him if he could go with me down on the vessel since I had no money left to pay the fare with and after a while the Customs Guard took driver him down aboard and the three of us went down together. on the way down I did not see Robinson and do not know where he went to since I stayed there a few minutes talking driver

to the guard in order to get him to go down to the ship with us. After they come down to the vessel and I had paid the fare they left and I was tired and went to sleep right away.

The first thing I know about the accident was about 7.00 A. M. when I was called by master and the American counsel and asked if I was the man that was together with Robinson coming down in a taxi together about a quarter of three and I said I was and felt very bad about hearing Robinson had been killed by a locomotive.

SAMUEL WOODS,

SMUEL WOODS.

A. B. SS. *North Beacon*